

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.** See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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**FEB 23 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2008-0216-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
EDWIN ANTHONY PELLECIER,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-60649

Honorable Michael O. Miller, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Creighton Cornell

Tucson  
Attorney for Petitioner

H O W A R D, Presiding Judge.

¶1 After a jury trial, petitioner Edwin Anthony Pellecier was convicted in 1998 of first-degree murder and three counts of aggravated assault and sentenced to a life term of imprisonment, followed by three concurrent prison terms of 7.5 years. This court consolidated Pellecier’s appeal with the petition for review of the denial of his first petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.; we affirmed the

convictions and sentences and denied post-conviction relief. *State v. Pellecier*, Nos. 2 CA-CR 1998-0452, 2 CA-CR 2002-0212-PR (consolidated) (memorandum decision filed Mar. 31, 2003). In this petition for review, Pellecier contends he is entitled to relief on claims he raised in his second petition for post-conviction relief. Absent a clear abuse by the trial court of the discretion vested in it to determine whether post-conviction relief is warranted, we will not disturb the trial court's ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 The facts, which we viewed as required in the light most favorable to sustaining the verdicts, *see State v. Carlos*, 199 Ariz. 273, 275, 17 P.3d 118, 120 (App. 2001), are set forth in this court's March 2003 memorandum decision. *Pellecier*, Nos. 2 CA-CR 1998-0452 & 2002-0212, ¶ 2. Among the numerous issues Pellecier raised on appeal was prosecutorial misconduct during cross-examination of a defense witness and in closing argument. *Id.* ¶¶ 24-27. In his consolidated petition for review, he challenged the trial court's denial, after an evidentiary hearing, of his claim of ineffective assistance of trial counsel. Pellecier had alleged numerous instances of counsel's purportedly deficient performance. *Id.* ¶¶ 30-38.

¶3 In this post-conviction proceeding, Pellecier asserted a claim he characterized as based on "new evidence pursuant to Rule 32.1(e)" and argued his due process rights were violated in connection with that newly discovered evidence; this claim was related to a detective's testimony about bullet trajectory, which Pellecier asserted was incorrect and possibly fabricated. Pellecier also demanded the release of "*Brady* material," *see Brady v. Maryland*, 373 U.S. 83 (1963), and sought further discovery, maintaining that he "was

convicted in violation of *Brady*” and that the prosecutor was guilty of misconduct related to such evidence. Additionally, Pellecier raised claims of ineffective assistance of counsel. First, he asserted trial counsel Dan Grills had been ineffective with respect to the detective’s bullet-trajectory testimony. He also contended appellate counsel Jill Thorpe had been ineffective, again related to the bullet-trajectory issue and to her failure to assert on appeal that the prosecutor had committed misconduct.

¶4 In the fourth “argument” he raised in his petition for post-conviction relief, Pellecier asserted that, if he were given a new trial, he would “present a completely different case.” He outlined evidence he would present and testimony he would elicit at such a trial, suggesting trial counsel had been ineffective for failing to present such a defense. Pellecier also asserted he was entitled to relief pursuant to Rule 32.1(h), insisting summarily that the ballistics evidence he would have presented would have corroborated defense witnesses’ testimony and that “[t]he strength of [his] ‘actual innocence’ claim increases in direct proportion to the amount of prosecutorial misconduct that exists.” Finally, as his last argument, he asserted he was entitled to be resentenced because he was entitled to relief based on his preceding five arguments and because his sentence was either excessive or unconstitutional for other reasons.

¶5 In thorough, well-reasoned minute entries, the trial court denied Pellecier’s petition for post-conviction relief. In its final order, the court denied relief on the claim of ineffective assistance of appellate counsel Jill Thorpe after an evidentiary hearing at which Thorpe testified. Although the claims Pellecier raised were often confusing, overlapping, and at times seemingly not cognizable under Rule 32.1, the court nevertheless deciphered

them, identified them clearly, and resolved them correctly. No purpose would be served by rehashing the court's rulings here; instead, we adopt those rulings, noting certain portions below. *See Swoopes*, 216 Ariz. 390, ¶ 47, 166 P.3d at 959.

¶6 On review, Pellecier essentially reiterates the claims he asserted in the trial court. As in the petition filed below, the true nature of the claims and Pellecier's reasoning are, at times, not entirely clear. Additionally, Pellecier asserts many of the claims summarily, either citing no supportive authority at all or citing authority in a cursory fashion without establishing why he was entitled to post-conviction relief. Pellecier does not persuade us the trial court abused its discretion by denying his request for post-conviction relief. We note, in particular, Pellecier's convoluted argument that the court erred when it found precluded his claims of prosecutorial misconduct and ineffective assistance of trial counsel, which he had asserted in arguments two through five of his second petition for post-conviction relief. The court correctly pointed out in its minute entry of June 28, 2006, that Pellecier had raised the issue of prosecutorial misconduct on appeal. And, in his first post-conviction proceeding, he had raised claims of ineffective assistance of trial counsel, some of which related to prosecutorial misconduct, which the trial court had rejected after an evidentiary hearing. Thus, Pellecier was precluded from raising those claims in this proceeding, including any claims of ineffective assistance of trial counsel that he had raised or could have raised in the first post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2(a)(2) and (3); *see also Swoopes*, 216 Ariz. 390, ¶ 23, 166 P.3d at 952-53.

¶7 The trial court was also correct in ruling that Pellecier was not entitled to relief pursuant to Rule 32.1(e) based on newly discovered evidence related to the detective's bullet-

trajectory testimony. Again, the court reached this conclusion after carefully evaluating the proffered evidence and considering whether it satisfied the requirements of Rule 32.1(e). The court found the evidence was not “new evidence” as the rule contemplates, and Pellecier has not persuaded us otherwise on review. Similarly, the court correctly rejected Pellecier’s claim of “actual innocence” pursuant to Rule 32.1(h). That during the years following his conviction Pellecier had thought of other ways in which he might have been able to corroborate his testimony and the testimony of other defense witnesses does not mean he is entitled to relief under this subsection of the rule. Pellecier has not persuaded us the trial court abused its discretion when it found he had failed to present, as the rule requires, “clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt . . . .” Ariz. R. Crim. P. 32.1(h).

¶8 Finally, the trial court noted correctly that a claim of ineffective assistance of appellate counsel will not be regarded as waived and precluded if, as here, the same attorney represents the defendant both on appeal and in the first Rule 32 proceeding. *See State v. Bennett*, 213 Ariz. 562, ¶¶ 14-15, 146 P.3d 63, 67 (2006). But the court addressed the merits and denied relief on this claim, too, in a detailed minute entry after an evidentiary hearing. Among the court’s findings was that Thorpe had made reasonable tactical decisions about which issues to raise on appeal. The court implicitly acknowledged the principle that attorneys must be given leeway to exercise their judgment in making such decisions. *See State v. Febles*, 210 Ariz. 589, ¶ 20, 115 P.3d 629, 636 (App. 2005) (it is appellate counsel’s responsibility “to winnow[] out weaker arguments on appeal and focus[] on’ those more

likely to prevail”), quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (alteration in *Febles*). And the mere fact that appointed counsel in this post-conviction proceeding might have done things differently had he represented Pellecier on appeal does not mean Thorpe’s strategy was faulty or that her performance fell below prevailing professional norms. See *State v. Nirschel*, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987) (“disagreements in trial strategy will not support a claim of ineffective assistance of counsel, provided the challenged conduct has some reasoned basis”). The trial court concluded Pellecier had not established that Thorpe had performed deficiently. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to prevail on claim of ineffective assistance of counsel, defendant must show counsel’s performance was deficient and prejudicial); *State v. Nash*, 143 Ariz. 392, 397-98, 694 P.2d 222, 227-28 (1985) (same). Pellecier has failed to sustain his burden of showing the trial court abused its discretion.

¶9 The petition for review is granted, but for the reasons stated, relief is denied.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge